No. 15722

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH D'AGOSTINO, Claimant, of ONE 1957 LINCOLN PREMIERE TWO-DOOR HARDTOP COUPE, MOTOR NO. 57WA5592L, its tools and appurtenances,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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FILED

MAY 22 1958

PAUL P. O'BRIEN, CLERK

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

Jurisdiction 1

Statutes involved 2

Statement of the case 4

Summary of argument 6

Argument 7

I.

The evidence supports the trial court's finding that the 1957 Lincoln Premiere two-door hardtop coupe, motor No. 57WA5592L, its tools and appurtenances, was used by appellant, Joseph D'Agostino, in receiving wagers and as an active aid to and facilitation of his wagering business 7

II.

The judgment is not contrary to law because the use by appellant, Joseph D'Agostino, of the seized automobile to receive wagers and to aid and facilitate his wagering business comes within the meaning of Section 7302 of the Internal Revenue Code, which subjects an automobile to forfeiture when it is ". . . intended for use in violating . . . the Internal Revenue laws . . . or which has been so used . . ." 10

III.

Section 7302 of the Internal Revenue Code, on its face and as construed and applied in this case, is constitutional and fully within the contemplation of Article I, Section VIII of the United States Constitution: To-wit: The power of Congress to lay and collect taxes and to make all laws which shall be necessary and proper for carrying into execution that power 17

TABLE OF AUTHORITIES CITED

Cases

PAGE

Fidelity and Casualty Company of New York v. Phelps, et ux., 64 F. 2d 233 14

National Surety Company v. Globe Grain and Milling Company, 256 Fed. 601 14

Standard Oil Company v. Shipowners' and Merchants' Tugboat Company, 17 F. 2d 366 14

United States v. General Motors Acceptance Corporation, 239 F. 2d 102 .... 11, 15

United States v. Lane Motor Company, 344 U. S. 630 .... 14, 15, 16

United States v. One 1941 Buick, 85 Fed. Supp. 402 16

United States v. One Chevrolet, etc., 91 Fed. Supp. 272 16

United States v. One 1951 Lincoln, 213 F. 2d 786 15

United States v. One 1953 Oldsmobile Sedan, 132 Fed. Supp. 14 .... 10, 11

Woodbury, et al. v. City of Shawnee Town, 74 Fed. 205 14

Statutes

Internal Revenue Code, Sec. 7301 17

United States Code, Title 26, Sec. 4401 2

United States Code, Title 26, Sec. 4411 .... 2, 4, 9, 14

United States Code, Title 26, Sec. 4412 .... 3, 4, 5, 9, 14

United States Code, Title 26, Sec. 7302 .... 10, 11, 13, 14, 15, 16, 17, 18

United States Code, Title 28, Sec. 1291 2

United States Code, Title 28, Sec. 1294(1) 2

United States Code, Title 28, Sec. 1355 1

United States Constitution, Art. I, Sec. VIII 18

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JOSEPH D'AGOSTINO, Claimant, of ONE 1957 LINCOLN PREMIERE TWO-DOOR HARDTOP COUPE, MOTOR NO. 57WA5592L, its tools and appurtenances,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

The United States District Court had jurisdiction to render its judgment in the action entitled *United States of America v. One 1957 Lincoln Premiere* 2-door hardtop Coupe, Motor No. 57WA5592L, its tools and appurtenances, Civil No. 389-57 Y, pursuant to the authority contained in Title 28, United States Code, Section 1355. There is no dispute that the libeled automobile and the appellant are within the Central Division of the Southern District of California.

This court has jurisdiction of this appeal from the Findings of Fact, Conclusions of Law and Final Judgment of the District Court in favor of the appellee and against the appellant ordering the said 1957 Lincoln

Premiere 2-door hardtop Coupe, Motor No. 57WA5592L, its tools and appurtenances, condemned and forfeited to the United States of America. Under the provisions of Title 28, United States Code, Sections 1291 and 1294(1) said judgment and order was a final decision of the District Court.

Statutes Involved.

Title 26, United States Code:

"Section 4401. Imposition of tax.

(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 525."

Title 26, United States Code:

"Section 4411. Imposition of tax.

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax

under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 527."

"Title 26, Section 4412. Registration.

(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 527."

"Title 26, U. S. C., Section 7302. Property used in violation of internal revenue laws.

It shall be unlawful to have or possess any property intended for use in violating the provisions of

the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 867."

Statement of the Case.

This is an appeal from a decision of the District Court condemning and forfeiting One 1957 Lincoln Premiere 2-door hardtop Coupe, Motor No. 57WA5592L, its tools and appurtenances, to the United States of America for its use by the appellant, Joseph D'Agostino, in, and as an active aid to, his wagering business in violation of the internal revenue laws concerning wagering; to-wit: Sections 4411 and 4412 of Title 26, United States Code.

Appellant is the claimant and the legal and registered owner of the subject Lincoln automobile. The evidence as later discussed, shows that appellant used the vehicle in, and as an active aid to, his wagering business, which business he was conducting prior to and up until February 28, 1957, so as to subject the car to forfeiture. Appellant has never filed an application for a wagering

permit nor has he ever paid his wagering occupational tax. Also, he has never registered with the official in charge of the internal revenue district as a person required to pay a special tax pursuant to Section 4412 of Title 26, United States Code.

On or about February 28, 1957, duly authorized and acting investigators of the Intelligence Division, Internal Revenue Service, Treasury Department of the United States, seized the said 1957 Lincoln automobile in the City of Los Angeles, County of Los Angeles, State of California. Thereafter, the Government filed its Libel of Information wherein it alleged the illegal use of the vehicle by appellant in his wagering activities which subjected the car to condemnation and forfeiture.

The appellant filed an Answer to the Government's Libel. After the conclusion of the trial the District Court gave judgment in favor of the Government and ordered the condemnation and forfeiture, to the United States, of the 1957 Lincoln Premiere 2-door hardtop Coupe, Motor No. 57WA5592L, its tools and appurtenances.

Appellee is unable to cite pages of a Transcript of Record since none was printed. It is appellee's understanding that appellant had permission to proceed on a typewritten Transcript of Record. However, appellee has only received a copy of the Reporter's Transcript of Proceedings in the District Court and we do hereinafter refer this court to page references in that Transcript. It appears that appellant has never filed a Designation of Record on Appeal nor a Statement of Points upon which he intends to rely on appeal in this court and we submit this Appellee's Brief in reply to Appellant's Opening Brief without benefit of those items.

Summary of Argument.

I.

THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDINGS THAT THE 1957 LINCOLN PREMIERE TWO-DOOR HARDTOP COUPE, MOTOR NO. 57WA5592L, ITS TOOLS AND APPURTENANCES, WAS USED BY APPELLANT, JOSEPH D'AGOSTINO, IN RECEIVING WAGERS AND AS AN ACTIVE AID TO AND FACILITATION OF HIS WAGERING BUSINESS.

II.

THE JUDGMENT IS NOT CONTRARY TO LAW BECAUSE THE USE BY APPELLANT, JOSEPH D'AGOSTINO, OF THE SEIZED AUTOMOBILE TO RECEIVE WAGERS AND TO AID AND FACILITATE HIS WAGERING BUSINESS, COMES WITHIN THE MEANING OF SECTION 7302 OF THE INTERNAL REVENUE CODE, WHICH SUBJECTS AN AUTOMOBILE TO FORFEITURE WHEN IT IS, . . . "INTENDED FOR USE IN VIOLATING . . . THE INTERNAL REVENUE LAWS . . . OR WHICH HAS BEEN SO USED . . ."

III.

SECTION 7302 OF THE INTERNAL REVENUE CODE, ON ITS FACE AND AS CONSTRUED AND APPLIED IN THIS CASE, IS CONSTITUTIONAL AND FULLY WITHIN THE CONTEMPLATION OF ARTICLE I, SECTION VIII OF THE UNITED STATES CONSTITUTION: TO-WIT: THE POWER OF CONGRESS TO LAY AND COLLECT TAXES AND TO MAKE ALL LAWS WHICH SHALL BE NECESSARY AND PROPER FOR CARRYING INTO EXECUTION THAT POWER.

ARGUMENT.

I.

The Evidence Supports the Trial Court's Finding That the 1957 Lincoln Premiere Two-Door Hardtop Coupe, Motor No. 57WA5592L, Its Tools and Appurtenances, Was Used by Appellant, Joseph D'Agostino, in Receiving Wagers and as an Active Aid to and Facilitation of His Wagering Business.

The evidence introduced at the trial of this case clearly shows that Joseph D'Agostino was a gambler and a bookmaker, and that he was professionally engaged in the business of receiving wagers. He engaged in his bookmaking activities without filing an application for a wagering permit and without paying the wagering occupational tax. It was stipulated that Mr. D'Agostino did not possess a Federal Wagering Tax Stamp. [R. 3.]

Officers of the Los Angeles Police Department testified that on or about February 27, 1957, they were in the process of raiding a bookmaking "spot" located at 2602 West Grand Avenue in the City of Alhambra, California. During the course of this raid the telephone at that address rang and it was answered by officer Joseph S. Deiro. The person on the phone identified himself as "Joe" to officer Deiro. The officer advised "Joe" of the raid and arrests at that address and the person on the telephone suggested a meeting with the officer at a 76 Gasoline Station at Fremont and Main Street in Alhambra. The officer went to that location and there met the appellant, Mr. Joseph D'Agostino. Mr. Joseph D'Agostino had the Lincoln automobile, which is now in question, with him at that time. During this meeting the appellant and the officer engaged in conversation in which appellant

requested the "owe-sheets" and "betting markers," or a copy thereof, which were seized during the raid of the bookmaking "spot" on West Grand Avenue in Alhambra. Appellant was told by the officer that he would get the "owe-sheets" and the "betting markers" and allow the appellant to copy them at another time. They arranged to meet the following day at a drive-in restaurant at Sunset Boulevard and Vermont Avenue in Hollywood, California. When the appellant left the officer he gave him $100.

On the following day, February 28, 1957, at approximately 3:30 p.m. officer Deiro, accompanied by officer Charles M. Holmes, met the appellant at the aforementioned drive-in. The appellant drove the subject Lincoln automobile. During this meeting the appellant was told that they could not give him the "sheets" but they did offer to let him copy them. Appellant then and there did copy the various betting sheets. During this meeting the officers had a conversation with him regarding his bookmaking activities in which he admitted engaging in bookmaking.

On February 28, 1957, appellant went to the offices of the Administrative Vice Detail of the Los Angeles Police Department located at 150 North Los Angeles Street in the City of Los Angeles. Present there were the appellant (Mr. Joseph D'Agostino) Sergeant Ira B. Dole, Sergeant Lievan, and officer Deiro. While there, the appellant engaged in a conversation with these officers. [R. 83-111.] Appellant admitted to the officers that he was engaged in the bookmaking business and that he would use his Lincoln automobile to go around to his bettors several times a week to make collections and payoffs on various wagers he had received from them. [R. 104-105.]

When the appellant was on the stand [R. 38] he admitted he owned no other automobile aside from the subject Lincoln automobile. During cross-examination [R. 63] he denied that he was a bookmaker and denied parts of the conversation which occurred at the offices of the Administrative Vice Detail of the Los Angeles Police Department. A comparison of his testimony and of the transcript of the recording, which we played into evidence, indicates that the appellant lied while on the stand as to these details.

The conversation which took place in the offices of the Administrative Vice Detail of the Los Angeles Police Department conclusively shows that Mr. Joseph D'Agostino was a person who engaged in the business of receiving wagers and that he used the subject Lincoln automobile as an active aid to and facilitation of that business. The appellant admitted that he never possessed a Federal Wagering Tax Stamp and, therefore, his activity in receiving wagers was in violation of the internal revenue laws requiring it. To-wit: Sections 4411 and 4412 of the Internal Revenue Code.

Mr. D'Agostino lied about the use of the car by him in his wagering activities while he was on the stand and from that fact we can only draw one inference, and that is, that the truth lies directly opposite to the way he testified, namely, that the car *was used* by appellant in his business of receiving wagers and as an active aid to and facilitation of that wagering business.

The entire record clearly shows that the appellant did, in fact, use his 1957 Lincoln automobile in his business of receiving wagers and as an active aid to and facilitation of that wagering business when he, the appellant, was not

possessed of a Federal Wagering Tax Stamp as required by the Internal Revenue Code.

Therefore, the evidence conclusively supports the trial court's findings that the 1957 Lincoln automobile, its tools and appurtenances, was used by Joseph D'Agostino in receiving wagers and as an active aid to and facilitation of his wagering business.

II.

The Judgment Is Not Contrary to Law Because the Use by Appellant, Joseph D'Agostino, of the Seized Automobile to Receive Wagers and to Aid and Facilitate His Wagering Business Comes Within the Meaning of Section 7302 of the Internal Revenue Code, Which Subjects an Automobile to Forfeiture When It Is ". . . Intended for Use in Violating . . . the Internal Revenue Laws . . . or Which Has Been so Used . . ."

The types of uses to which Mr. D'Agostino put the subject vehicle have been held to be within Section 7302 of Title 26, United States Code, so as to justify seizure and forfeiture of the vehicle. In the case of *United States v. One 1953 Oldsmobile Sedan,* 132 Fed. Supp. 14, the court held that where the evidence established that the owner of the vehicle was engaged in the business of accepting wagers without having paid a special tax, and was using his automobile in that business, the Government was entitled to a decree of forfeiture. In that case the car was used to keep in contact with the persons who made the wagers and on the days following certain wagers the bookmaker would call upon his customers. If the bettor won the wager then the bookmaker would pay and if the bettor lost the wager then the bettor would make the pay-off to the bookmaker. In other words, the bookmaker

used the vehicle to make his collections and pay-offs and in that case the court found that such a use was within the meaning of Section 7302. It is interesting to note that upon a careful reading of the *Oldsmobile* case we find a use which exactly parallels the use made of the Lincoln automobile by Mr. D'Agostino in the instant case.

It has further been held that Section 7302 of the Internal Revenue Code is a broad Section and should not be narrowly construed.

> *United States v. General Motors Acceptance Corporation* (C. A. 5), 239 F. 2d 102.

In the *General Motors Acceptance* case Judge Reeves, in delivering the opinion of the Fifth Circuit, said:

> ". . . It is urged that 'Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law.' United States v. One 1936 Model Ford V-8 De Luxe Coach, 307 U. S. 219, 226, 59 S. Ct. 861, 865, 83 L. Ed. 1249. As noted in the same opinion, however, 'The point to be sought is the intent of the law-making powers.' In an earlier case, the Supreme Court had said:
>
> 'We are not called upon to give a strained interpretation in order to avoid a forfeiture. Statutes to prevent fraud on the revenue are construed less narrowly, even though a forfeiture results, than penal statutes and other involving forfeitures.' United States v. Ryan, 284 U. S. 167, 172, 52 S. Ct. 65, 67, 76 L. Ed. 224. See, also Manufacturers Acceptance Corporation v. United States, 6 Cir., 193 F. 2d 622.
>
> It is said that we should construe §7302 with especial strictness since 18 U. S. C. A. §3617, providing for remission or mitigation of forfeitures, has

reference only to the liquor tax laws. Available, however, are the compromise powers of the Secretary of the Treasury and the Attorney General, which formerly provided the procedure to afford relief to innocent owners in liquor tax cases. United States v. One 1936 Model Ford V-8 De Luxe Coach, supra.

The gist of the offense is said to be the failure to pay the tax, and the truck was not used in failing to pay the tax. Section 7302 requires only that the vehicle be used or intended for use 'in violating the provisions of the internal revenue laws.' One of the acts going to constitute such violation was the engaging in the business of receiving wagers especially when, as here alleged, that was done 'with intent to defraud the United States of the wagering occupational tax.' A like contention has not prevailed in liquor tax cases. One Ford Tudor Automobile, etc. v. United States, supra; United States v. Ganey, supra; Jarrett v. United States, 4 Cir., 184 F. 2d 532; Shively v. United States, 4 Cir., 210 F. 2d 131.

Finally, it is insisted that, while §7302 of the 1954 Code broadens the scope of §3116 of the 1939 Code, it should be confined to cases involving a commodity upon which a tax is imposed, that the truck itself must in some way be guilty. See Goldsmith, Jr.-Grant Co. v. United States, 254 U. S. 505, 510, 511, 41 S. Ct. 189, 65 L. Ed. 376; United States v. One 1948 Plymouth Sedan, 3 Cir., 198 F. 2d 399; United States v. Lane Motor Co., 344 U. S. 630, 73 S. Ct. 459, 97 L. Ed. 622. In the last cited case, the Supreme Court held 'that a vehicle used solely for commuting to an illegal distillery is not used *in* violating the revenue laws.' 344 U. S. at page 631, 73 S. Ct. at page 460. The rule is different, however, where the vehicle is used not merely for the convenience of

> the operator in commuting, but also as an active aid in violating the revenue laws, even though not for the transportation of any commodities subject to seizure. United States v. One 1952 Lincoln Sedan, 5 Cir., 213 F. 2d 786; One Ford Tudor Automobile, etc. v. United States, supra; United States v. Ganey, supra; Jarrett v. United States, supra; Shively v. United States, supra. Cf. United States v. Jones, 5 Cir., 194 F. 2d 283.
>
> The plain language of §7302 covers a truck used and intended for use in violating the wagering tax laws. The judgment is therefore reversed and the cause remanded for further proceedings consistent with this opinion."

Since Section 7302 of the Internal Revenue Code is, in its plain reading, a very broad statute, such use of a vehicle as was shown and found in this case falls clearly within its meaning and subjects the vehicle to forfeiture. The clear intention of Congress in the passage of such a broad Section appears to be to double and increase the penalties involved in violations of the Internal Revenue Act so as to discourage persons who engage in such violations. As was pointed out by the trial court, in its oral opinion [R. 121-124], it is because many of us are adverse to seeing multiple penalties piled up that we overlook the fact that it is a recognized procedure to discourage certain particular activities. It is not the duty of courts to change this procedure by way of judicial legislation but is a policy matter solely within the discretion of Congress.

In this case, we have clear Findings of Fact by the District Court as to the use of the 1957 Lincoln automobile by Mr. D'Agostino in receiving wagers and as an active aid and facilitation to him in his bookmaking busi-

ness. It is a well-recognized principle that a trial judge's findings of fact are never to be lightly disturbed by a reviewing court. Generally, appellate courts will not overturn findings of fact of the trial judge, since he has had the opportunity to hear and see the witnesses. The trial judge's findings must be given great weight and should be binding, unless clearly based on an obvious error of law or a serious mistake or misconception of a fact.

> *Standard Oil Company v. Shipowners' and Merchants' Tugboat Company*, 17 F. 2d 366 (C. A. 9);
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> *National Surety Company v. Globe Grain and Milling Company*, 256 Fed. 601 (C. A. 9);
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> *Woodbury, et al. v. City of Shawnee Town*, 74 Fed. 205 (C. A. 7);
>
> *Fidelity and Casualty Company of New York v. Phelps, et ux.*, 64 F. 2d 233 (C. A. 4).

There is no contention that violations of Sections 4411 and 4412 are not violations of the internal revenue laws and since these sections are part of the Internal Revenue Code, as passed by Congress, any violations of them would invoke the operation of Section 7302, of the Internal Revenue Code.

One of the leading cases involving a vehicle seized for violating Section 7302 of Title 26, United States Code, was the case of *United States v. Lane Motor Company*, 344 U. S. 630. In that case the United States Supreme Court held that "a vehicle used *solely* for commuting to an illegal distillery is not used in violating the internal revenue laws," (at p. 631). The *Lane Motor Company* case apparently implies that where the vehicle was used for *something more* than merely commuting, *it can be* in

violation of the internal revenue laws. It follows, therefore, that if the vehicle was used for *something more* than commuting and is violating some internal revenue laws it is subject to forfeiture pursuant to Section 7302, Title 26, United States Code. (Emphasis added.)

A review of the cases aids us in determining what has been held to be that *something more* than merely commuting. In the case of *United States v. General Motors Acceptance Corporation,* cited *supra,* in a situation involving the use of a truck in connection with the business of receiving wagers in violation of law, it was held that the truck in question was not used "merely for the convenience of the operator in commuting, but also as an active aid in violating the revenue laws, even though not for the transportation of any commodities subject to seizure" and, therefore, the court held the vehicle properly subject to forfeiture pursuant to Section 7302, Title 26, United States Code.

The court in the *General Motors Acceptance Corporation* case cited, *inter alia,* the case of *United States v. Lane Motor Company, supra,* and also cited the case of *United States v. One 1952 Lincoln,* 213 F. 2d 786, in which latter case the court pointed out that Section 7302, "does not place any express limitation on the manner in which property intended for use in violation of revenue laws is employed, nor does it require in terms that the liquor be transported in the automobile." It was also pointed out by the court in the *1952 Lincoln* case that the case is controlled by the *general* provisions for forfeiture contained in Section 7302, of the Code, and *not* by the more limited provisions of the forfeiture contained in the other sections of the Code. (Emphasis added.)

Article I, Section VIII of the United States Constitution reads as follows:

> "Section VIII,
>
> The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;
>
> . . .
>
> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

Pursuant to this Constitutional authority Congress passed the Internal Revenue Code. Section 7302 of the Internal Revenue Code was passed by Congress in order to implement the execution of its taxing power. Congress has the power to pass such an enforcement Section. Therefore, Section 7302 on its face and as applied and construed in this case is constitutional as falling within the innumerated powers of Congress as specified by the United States Constitution.

Respectfully submitted,

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